Introduction to consideration of recommendations for shooting preserve welfare standards; Administrative Cause No. 13-098D

In recent adjudicatory proceedings, remonstrators raised several issues, including the adequacy of rules governing the licensure of shooting preserves under IC 14-22-31. The Division of Fish and Wildlife administers and oversees the licensing of shooting preserves that include annual inspections by Indiana Conservation Officers.

An administrative law judge issued "Findings of Fact and Conclusions of Law with Nonfinal Order" in the adjudicatory proceedings on May 9, 2013. The substance of the nonfinal order is attached. The aspects of the nonfinal order pertaining to the adequacy of rules begin with Findings near the bottom of page 10 and conclude on page 15. In addition, the first sentence of Order (4) on page 19 references the subject. See portions marked in **bold green**. The crux is the provisions governing the licensure of shooting preserves that anticipate rules in accordance with IC 14-22-2-6 to evaluate: (A) The welfare of the wild animal. (B) The relationship of the wild animal to other animals. (C) The welfare of the people. The administrative law judge concluded rules have not been adopted that were authorized in IC 14-22-31. A proposed new rule for was given preliminary adoption in November 2012 (now LSA Document #13-24), that sets forth requirements for signs which must be posted around a shooting preserve pursuant to IC 14-22-31-6, but this rule would not address "welfare" issues.

The adjudicatory proceedings are still active, with AOPA Committee action required on objections by Markland to the Nonfinal Order, potentially to be heard at a meeting on July 16. The Advisory Council is being advised of the subject and the potential for DNR recommendations concerning the establishment of standards for welfare issues. During the meeting, the DNR may outline possible approaches to the subject. This subject was identified for Advisory Council consideration during the May 2013 Commission meeting.

BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA

IN THE MATTER OF:

HANS MARKLAND,	)	**Administrative Cause**
Claimant,	)	**Number: 11-171D**
	)	
vs.	)	
	)	
CRACK OF DAWN HUNT CLUB and	)	
DEPARTMENT OF NATURAL RESOURCES,	)	**(Shooting Preserve**
Respondents.	)	**Licensure)**
	)	
HANS MARKLAND,	)	**Administrative Cause**
Claimant,	)	**Number: 12-125D**
	)	
vs.	)	
	)	
DARRELL SWISTEK, d/b/a/,	)	
CRACK OF DAWN HUNT CLUB, and	)	
DEPARTMENT OF NATURAL RESOURCES,	)	**(Shooting Preserve**
Respondents.	)	**Licensure Renewal)**

FINDINGS OF FACT AND CONCLUSIONS OF LAW
WITH NONFINAL ORDER

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Statement of the Proceedings and Jurisdiction

1. *Hans Markland v. Crack of Dawn Hunt Club and Department of Natural Resources*, Administrative Cause No. 11-171D, was initiated pro se by Hans Markland ("Markland") on September 27, 2011. He sought administrative review of a shooting preserve license (the "original license") issued by the Department of Natural Resources (the "DNR") under IC 14-22-31 through its Division of Fish and Wildlife to Darrell Swistek ("Swistek"), doing business as Crack of Dawn Hunt Club, for a site containing approximately 156 acres in Walker Township, Jasper County, Indiana. The original license was effective from September 23, 2011 through April 30, 2012.

2. On March 10, 2012, Swistek sought a renewal license (the "renewal license") for a shooting preserve under IC 14-22-31 at the same Jasper County location as the original license. On July 20, 2012, the DNR granted the renewal license. A copy of the renewal license was attached to Markland's timely request for review of the renewal license and provided in substantive parts as follows:

> Darrell Swistek of 1419 S. Holmesville Rd., LaPorte 46350 is hereby granted a license to operate a Private Shooting Preserve from September 1, 2012 to and including April 30, 2013 pursuant to and subject to all provisions of law and to all regulations and restrictions imposed by the Director [of the DNR] according to law, including those regulations and restrictions attached to [the renewal license]. This Preserve has a business name of Crack of Dawn Hunt Club and is located in Jasper [County, Section] 14[,] Walker [Township, containing] 156.49 [acres] AND under the direct supervision of Darrell Swistek.
>
> [The renewal license] must be on the person of the License Holder when engaged in the respective pursuit for which the license is granted and be produced upon request of any authorized Law Enforcement officer. This license may be revoked by the Director [of the DNR] at any time, without refund, for failure to comply with, or violation of regulations of restrictions enclosed, or for violation of any provision of the Fish and Wildlife Code.

Restrictions attached to the renewal license were as follows:

> …The following conditions are made in addition to the specification on [the renewal license]:
> (1) Hunting is not allowed within a distance of 300 yards of any building, and
> (2) Hunting is not allowed in fields designated as #1 and #2 that are adjacent to property owned by Mr. Hans Markland when farm equipment is moving on the farmland.
>
> Although the Indiana DNR has not received any complaints or reports of any injuries from the operation of the shooting preserve since it opened, the DNR believes that these additional conditions will help to further ensure the safety of the public and nearby landowners. These conditions are in effect until an order is made by an Administrative Law Judge regarding Administrative Cause Number 11-171D.
>
> Please note that pheasants, quail, chukar partridges, Hungarian partridges and captive-reared, properly marked mallard ducks can be released on your shooting preserve. Your shooting preserve must have signs posted at intervals of not more than five hundred (500) feet and the boundary must be clearly defined by a fence of at least one (1) strand of wire prior to the property being used to take these species of brids under the authority of [the renewal] license.

> You must also issue bills of sale for all game birds taken on your shooting preserve, keep a daily register, and submit an annual report….

Administrative review of the renewal license was initiated by Markland's attorney and as *Hans Markland v. Darrell Swistek, d/b/a Crack of Dawn Hunt Club, and Department of Natural Resources,* Administrative Cause No. 12-125D. The original license and the renewal license are referred to collectively as the "subject licenses".

3. Under Ind. Code § 4-21.5 (sometimes referred to as the "Administrative Orders and Procedures Act" or "AOPA"), an "order" refers to "an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons. The term includes…a license." IC 4-21.5-1-9.

4. A "license" refers to "a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by law." IC 4-21.5-1-8. The Natural Resources Commission (the "Commission") is the "ultimate authority" for administrative reviews of DNR licensure determinations. IC 14-10-2-3. DNR issuance of the original license and the renewal license are governed by IC 14-22 (sometimes referred to as the "Fish and Wildlife Code") and are subject to Commission administrative review under AOPA. *Strasser v. DNR*, 9 Caddnar 103 (2003). More particularly, for consideration are administrative reviews under IC 14-22-31 pertaining to the licensure of shooting preserves.

5. On behalf of the Commission, the same administrative law judge was assigned under IC 14-10-2-2 to conduct AOPA proceedings for Administrative Cause No. 11-171D and Administrative Cause No. 12-125D. Markland, Swistek, and the DNR (collectively, the "parties") have participated in these proceedings.

6. The Commission has jurisdiction over the subject matter and over the persons of the parties.

B. Standing for Administrative Review

7. AOPA defines who has legal standing for administrative review. To qualify for administrative review of an agency order, IC 4-21.5-3-7(a)(1) provides that a person must:

> State facts demonstrating that:
> (A) the petitioner is a person to whom the order is specifically directed;
> (B) the petitioner is aggrieved or adversely affected by the order; or
> (C) the petitioner is entitled to review under any law.

8. For consideration in these proceedings are petitions to rescind the subject licenses. The licenses are "orders" under IC 4-21.5-1-9. Swistek is the person to whom the DNR orders were specifically directed under IC 4-21.5-3-7(a)(1)(A). Markland does not qualify for administrative review under IC 4-21.5-3-7(a)(1)(A).

9. Markland did not cite a particular law that entitled him to administrative review. He does not qualify for administrative review under IC 4-21.5-3-7(a)(1)(C).

10. Markland asserted he had the requisite standing for administrative review of the original license applying the principles in *Huffman v. Office of Environmental Adjudication*, 811 N.E.2d 806 (Ind. 2004). *Huffman* considers who is a person "aggrieved or adversely affected" under IC 4-21.5-3-7(a)(1)(B). "Essentially, to be 'aggrieved or adversely affected,' a person must have suffered or be likely to suffer in the immediate future harm to a legal interest, be it a pecuniary, property, or personal interest." *Huffman* at 810. "…'[A]ggrieved or adversely affected'…contemplates some sort of personalized harm." *Huffman* at 812.

11. In support of his assertion for the requisite standing, Markland provided an affidavit which stated in paragraph 3 in part:

> I reside at 58 W. 1000 N., Wheatfield, Walker Township, Jasper County, IN, which is adjacent and adjoining the real estate owned by the Hunt Club. My property is used for farming and residential purposes….

Affidavit of Hans Markland (December 29, 2011) attached as Exhibt 1 to Claimants Response in Opposition to Respondent Dept. of Natural Resources's Motion to Dismiss and/or Motion for Summary Judgment and Respective memorandums.

12. A resident of land adjacent to land where a shooting preserve license is issued, who contends he would suffer harm from the operation of the shooting preserve, appears to meet the *Huffman* standard for standing. Markland's December 29, 2011 affidavit and the claims for harm in the enjoyment of his residence were found by the administrative law judge to satisfy *Huffman* with respect to the original license.

13. The administrative law judge concluded Markland's demonstration of standing in the original license would also apply to the renewal license:

> With respect to Markland [for the original license], the administrative law judge concluded previously: "As owner of the adjacent real estate to [Crack of Dawn Hunt Club], Markland appears to satisfy the standing requirements of *Huffman*…." As Markland satisfied standing requirements for the original license so he would satisfy standing requirements for [the renewal] license.

Entry with Respect to the Department's Motion to Dismiss and with Respect to the Claimants' Motion to Amend Case Caption to Include Additional Claimants; Administrative Cause No. 12-125D (November 8, 2012).

14. The DNR cross examined Markland during the hearing:

> Wyndham: "Do you recall signing an affidavit that was part of motions filed by Mr. Etzler whereby you stated under penalties of perjury that you reside at 58 West 1000 North Wheatfield, Walker Township, Jasper County, Indiana, which is adjoining the real estate owned by the Hunt Club?"
> Markland: "I don't recall."
> Wyndham: "Is that your signature?"
> Markland: "That's my signature."
> Wyndham: "Do you want to read through that and decide whether you signed that affidavit."
> Markland: "I presume I did. It looks like my signature."
> Wyndham: "Do you agree that in paragraph 3 you made the statement that your residence is adjacent and adjoining to the real estate owned by the Hunt Club?"
> Markland: "It must be a mistake. That would be my son's."

15. With respect to the renewal license, Markland also joined unnamed "neighbors" in his request for administrative review. The DNR again sought dismissal for failure to comply with the standing requirements of AOPA. In the Claimants' Amended Petition for

Administrative Review, the names and Wheatfield, Indiana addresses were provided for 16 individual residents. Attached were property tax statements associated with their ownership of real estate.

16. In support of the 16 individuals' claims for standing was an affidavit with an attached "printout of webpages of the Crack of Dawn Hunt Club's website. Shown on the opening web page across the open field are houses of the Neighbors." Affidavit of Heather J. Auten (October 1, 2012) attached as Exhibit N to Claimants' Amended Petition for Administrative Review. The printout was attached to Exhibit H as Exhibit 1. Five houses were circled. The distances to these five houses were not offered in support of standing nor were the identities of particular owners.

17. The administrative law judge concluded a sufficient basis was not provided to support standing for the 16 named individuals. "Essentially, to be 'aggrieved or adversely affected,' a person must have suffered or be likely to suffer in the immediate future harm to a legal interest, be it a pecuniary, property, or personal interest." *Huffman* at 810. "…'[A]grieved or adversely affected'…contemplates some sort of personalized harm." *Huffman* at 812. They were dismissed as parties. None of the 16 named individuals[1] testified at hearing or subsequently filed documentation to locate their individual homes or to describe any personalized assertion of harm.

18. At hearing, Markland testified he sometimes farmed and otherwise occupied the real estate that is located at 58 West 1000 North. He testified he and his wife were selling the real estate to their son on a land contract. Markland testified he did not request his son to join in the proceeding, and his son has not sought to intervene.

19. In his most recent filing of Proposed Findings of Facts and Conclusions of Law, Markland supplemented the caption to add Judith Markland and the Markland Family Limited Partnership. He did not move for joinder nor did Judith Markland or the

[1] One of the named individuals is Judith Markland whose address is 58 W. 1000 N., Wheatfield, IN 46392. At hearing, Hans Markland testified he owns the property with Judith who is his wife. If Hans Markland has standing, a reasonable inference is that he is joined in the status by Judith Markland. Neither Hans nor Judith Markland made a claim for standing based upon their joint ownership.

Markland Family Limited Partnership move to intervene. No justification for the supplementation was provided.

20. Ownership of real estate adjacent to the site of the original permit and the renewal permit seems enough to satisfy standing, particularly since Hans Markland worked periodically and visited family there. Even so, his affidavit which inaccurately asserted residence is troubling. The DNR was required to contest standing based on untrue statements. Whether the inaccuracies were material is difficult to evaluate in retrospect, but the Commission was mislead. To an extent, the proceeding was compromised. Although Hans Markland has standing for himself, he has no standing to speak for neighbors. He has not established standing for the Markland Family Limited Partnership. If Judith Markland wishes to be included as a second Claimant, she should move and offer support for intervention.

C. Nature and Application of Administrative Review

21. At each stage of a proceeding, the person requesting that an agency take action has the burden of persuasion and the burden of going forward (sometimes collectively referred to as the "burden of proof"). IC 4-21.5-3-14(c) and *Indiana DNR v. Krantz Bros. Const*., 581 N.E.2d 935, 938 (Ind. App. 1991).

22. On administrative review, Markland may request the Commission take action to modify or set aside the subject licenses. As a matter of law, Markland has the burden of proof. In numerous instances, Markland would shift the burden of proof from himself to the DNR. One illustration is on page 3 of his Proposed Findings of Fact and Conclusions of Law:

> It is requested that based on the evidence, that the Court make the following factual conclusion:
>
> > DNR witness Ms. Petercheff, who reviewed the requirements for issuing a shooting preserve license, was required to determine the effects of such activity on the welfare of Mr. Markland and his family. Ms. Petercheff did not establish by evidence that she qualified with the education, training and experience to adequately investigate the flight distance of projectiles or the decibels of sounds at different distances which would be or was created by shooting and

> hunting activity on the Swistek property. Furthermore, Ms. Petercheff did not establish an evidentiary foundation which qualified her to make the proper investigation, weighed the technical and scientific information to establish these two standards of such shooting activity and whether an annoyance or nuisance be created for Mr. Markland as an adjoining property owner or user.

Markland may offer evidence that contradicts or refutes DNR data or analyses. The burden is not upon the DNR to prove that its data or analyses were correct. The burden is on Markland to prove they were not. Markland has the burden of proving to the Commission that the DNR issued the subject licenses erroneously.

23. "[A]n administrative agency does not have the power to make decisions properly committed to another agency. An administrative agency has only those powers that the legislature has conferred to it, and unless [there exists] the grant of powers and authority in the statute…, no power exists." [Court's citations omitted.] *Musgrave v. Squaw Creek Coal Company*, 964 N.E.2d 891, 902 (Ind. App. 2012). An Indiana state administrative agency has only those powers conferred to it by the Indiana General Assembly. Powers not within the legislative grant may not be assumed by the agency nor implied to exist in its powers. *Bell v. State Board of Tax Commissioners*, 651 N.E.2d 816, 819 (Ind. Tax Ct. 1995). The Claimants must demonstrate the DNR has statutory authority to address any claimed grievance arising from issuance of the subject permit.

24. Markland identified two theories to support denial of the subject licenses that are properly committed to an agency other than the DNR (or the Commission, on administrative review). One of these is a Warranty Easement Deed within the agency jurisdiction of the U.S. Department of Agriculture. The other is within the agency jurisdiction of the Jasper County Board of Zoning Appeals. Markland submitted a civil pleading in which he and others sought judicial review of a Jasper County Board of Zoning Appeals decision granting a special exception to the owners of the real estate where the Crack of Dawn Hunt Club operated. Included was a request to set aside the BZA's finding that the special exception did not "substantially diminish and impair property value within the neighborhood." He later sought to introduce the "Order on Petition for Writ of Certiorari and Cross-Motions for Summary Judgment" in the Jasper

Superior Court in which Markland and others prevailed. Designations of permissible land uses and designations of exceptions are intended to protect property values. These designations are appropriately left to local zoning boards and to the courts on judicial review. *Spaw v. Ashley*, 12 Caddnar 233, 236 (2010).

25. An administrative law judge conducts a proceeding de novo. IC 4-21.5-3-14(d). Rather than deferring to a DNR permitting determination, de novo review requires the administrative law judge to consider and apply proper weight to the evidence. *DNR v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). The administrative law judge must consider and apply proper weight to the evidence rather than deferring to the initial determination by the DNR to issue the subject permit.

D. Three Elements of Markland's Administrative Reviews

26. The Claimant's Verified Notice of Appeal of the original license was filed on February 2, 2012 and contained three elements. In response, the Department of Natural Resources' Second Motion to Dismiss and/or Motion for Summary Judgment was filed on February 8, 2012. The Claimant's Response in Opposition to Respondent Dept. of Natural Resource's Second Motion to Dismiss and/or Motion for Summary Judgment and Respective Memorandums was filed on February 22, 2012. In addition to the matters considered in Finding 1 through Finding 25, these documents helped frame the issues and were considered in an Interlocutory Order Regarding Dismissal of Portions of Markland's Amended Petition, for Partial Summary Judgment in Favor of the Department, Denying Markland's Request to Dismiss or Strike Pleadings by the Department, and Identifying Factual Issues for Hearing entered on March 6, 2012.

Element One: Sufficient of Regulatory Structure

27. Markland's first element in the Claimant's Verified Notice of Appeal urged:

> **Markland requests that after hearing in this matter it be determined that the regulations[2] governing whether or not to issue a permit by the DNR for a**

[2] The term "regulation" can refer to any agency statement of general applicability that has or is intended to have the force of law. In Indiana, the statutory term is "rule" for a state agency statement of general

shooting preserve license are insufficient as to its negative effect on adjoining residential properties violating the substantive due process rights of Markland as an adjoining property owner under the federal and state constitutions.

28. A state administrative agency has only the powers conferred on it by the Indiana General Assembly. Powers not within the agency's legislative grant of authority may not be assumed by the agency nor implied to exist in its powers. *Bell v. State Board of Tax Commissioners*, 615 N.E.2d 816, 819 (Ind. Tax Ct. 1995), citing *Fort Wayne Education Association, Inc. v. Aldrich*, 527 N.E.2d 201, 216 (Ind. Ct. App. 1988).

29. The General Assembly may authorize state agencies to adopt rules pursuant to IC 4-22. The DNR Director is authorized to adopt emergency rules, and the Commission is authorized to adopt permanent rules, to assist with the implementation of IC 14. IC 14-10-2-4. Permanent rules governing fish and wildlife are codified at 312 IAC 9.

30. The General Assembly addresses matters pertaining to wild animals in the Fish and Wildlife Code. The DNR Director and the Commission are authorized to adopt rules for the Fish and Wildlife Code.

31. The overarching legislative purpose for the Fish and Wildlife Code is "to protect and properly manage the fish and wildlife resources of Indiana." IC 14-22-1-1(b). The DNR Director is to "[p]rovide for the protection, reproduction, care, management, survival, and regulation of wild animal populations regardless of whether the wild animals are present on public or private property in Indiana." IC 14-22-2-3(1).

32. In adopting rules to administer the Fish and Wildlife Code, the following shall be considered:

(A) The welfare of the wild animal.
(B) The relationship of the wild animal to other animals.
(C) The welfare of the people.

---

applicability with the force of law. IC 4-22-2-3. For a federal agency, the term "regulation" is often applied. The record of this proceeding does not identify a participating federal agency. The context suggests Markland's reference to "regulation" applies to a "rule" that is or "rules" that are governed by IC 4-22.

IC 14-22-2-6(b).

33. For governance, "welfare" is a broad term that anticipates well-doing or well-being. BLACK'S LAW DICTIONARY, 6th Edition (West Publishing Co., 1990). "Welfare" refers to health, happiness, and general well-being. WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY (The Riverside Publishing Company, 1994).

34. IC 14-22-31 is the statutory chapter that governs most directly the licensure of shooting preserves. Markland did not identify technical deficiencies in the application for the subject licenses based on IC 14-22-31. The DNR provided documentation to demonstrate compliance. Swistek tendered the appropriate license fees. Swistek satisfied the chapter's requirements for geography and ownership. Swistek identified birds (pheasant, quail, and chukar partridges) that could be released lawfully in the shooting preserve. Respondent Department of Natural Resources' Designated Exhibits for Motion for Summary Judgment, Application for a Shooting Preserve License (Exhibit 3) and Affidavit of Linnea Petercheff (Exhibit 4). During the hearing of the merits, Conservation Officers testified to a site inspection that revealed signage deficiencies, but these were remedied by Swistek.

35. IC 14-22-31 authorizes the Commission to adopt a permanent rule (or the DNR Director to adopt a temporary rule) in three instances. These are set forth in IC 14-22-31-3, IC 14-22-31-7, and **IC 14-22-31-12(b).**

36. IC 14-22-31-3 provides in pertinent parts:

> …. Duck shooting is not permitted, if:
> (1) prohibited by a rule adopted under IC 14-22-2-6; or
> (2) wild ducks, geese, or other migratory game birds frequent the area where the captive reared and properly marked mallard ducks are to be held, released, and flighted for shooting.

Section 3(1) references a prohibition that may apply to the activities of a duck hunter, but the prohibition would not apply to the licensure of a shooting preserve. Section 3(1) is inapplicable to a consideration of the subject license. Section 3(2) is also inapplicable because Swistek did not seek authorization and the subject license does not authorize Swistek to release mallard ducks.

37. IC 14-22-31-7 provides in pertinent parts:

> A person issued a license under [IC 14-22-31-4] may propagate and offer for hunting the following animals that are captive reared and released… (2) species of exotic mammals that the [DNR Director or Commission] determines by rule.

Section 7 is inapplicable because Swistek did not seek authorization and the subject licenses did not authorize Swistek to release any species of exotic mammal.

38. IC 14-22-31-12(b) provides in pertinent parts:

> (b) An inspection of a shooting preserve shall be conducted under [IC 14-22-31] and rules adopted under IC 14-22-2-6….

Conservation Officers testified they conducted inspections, and they offered a video into evidence.

39. As stated previously, IC 14-22-2-6(b)(2) requires that rules be based on data relative to the following:

(A) The welfare of the wild animal.
(B) The relationship of the wild animal to other animals.
(C) The welfare of the people.

The Fish and Wildlife Act anticipates the issuance of a license to conduct a shooting preserve would be based on an inspection performed under IC 14-22-31-12(b) and IC 14-22-2-6(b)(2).

40. Rules have not been adopted that consider issues particular to IC 14-22-31 and the operation of shooting preserves. Nothing in the record indicates that the Commission has been requested to consider whether rules should be adopted to implement IC 14-22-2-6(b)(2) for a shooting preserve.

41. The absence of rules for the management of a shooting preserve, based on data referenced in IC 14-22-2-6(b)(2), has similarities to the situation analyzed in *Stites, et al. v. RCI Development & DNR*, 11 Caddnar 381 (2008). At issue there was pier placement in a public freshwater lake. By statute, the Commission was directed to adopt rules with objective standards for issuing licenses, including standards for the

configuration of piers. The Commission adopted rules for the placement of qualified temporary piers under what is commonly referred to as a "general license". A pier could be placed without a prior written license if the pier met specifications in the rules. But at issue in *Stites* was a "group pier". A group pier was disqualified from placement through a general license and required a prior written license. The Commission had not adopted standards if a written license was required. The administrative law judge concluded that, in the absence of specific rules, a written license was sufficient if it incorporated the principles supported by the rule establishing a general license. In effect, the administrative law judge borrowed the rule specifications for a general license and made them conditions for a written license.

42. Opponents of the group pier in *Stites* were dissatisfied with the administrative law judge's approach and filed objections for consideration by the AOPA Committee[3]. The AOPA Committee heard oral arguments on March 18, 2008 and requested additional briefing. Just before the AOPA Committee voted to affirm the administrative law judge on July 14, 2008, a member reasoned:

> **…"I first appreciate everyone's vast briefing. It was at my request that we gathered more information." He added, "I read all the briefs," but he said he continued to "struggle with" the Indiana Code provision which says the Natural Resources Commission "shall adopt rules" to assist in the administration and to provide objective standards. His expectation is that the General Assembly was directing the Commission to provide structure, "not so much as to point to what we already do," and not merely rules where necessary. The purpose was seemingly to provide citizens with an understanding of what the evaluation process would be.[4]**
>
> **…"That said, the more I looked at this, …I came under the conclusion I don't think the General Assembly intended this language to say 'unless you meet this provision your authority to license piers is no longer existing, and you can no longer issue permits.' If for no other reason than that laws become effective on the 1st of July, and the rule-making process takes six months, if you're lucky [from] when you've got the rule written." He added he thought it was unfortunate the Commission had not advanced beyond where it has with rule adoption pertaining to the Lakes Preservation Act, and he encouraged the agency to promptly adopt rules pertaining directly to**

[3] The AOPA Committee is the "commission committee" identified in 312 IAC 3-1-12.

[4] **The Commission subsequently adopted rules to address the licensure of group piers.** See, most notably, 312 IAC 11-4-8.

> **group piers. Even so, he had come to the conclusion the current status of the rules did not deprive the agency of regulatory authority.**

"Minutes of the AOPA Committee of the Natural Resources Commission" (July 14, 2008), p. 11 at www.ai.org/nrc/files/AOPA_July_2008.pdf.

43. Referencing his clients' affidavits in this proceeding, Markland's attorney asserted:

> Markland is the owner of adjacent and adjoining real estate and has had past experience from others using the property as a hunting club and shooting preserve. Markland has heard and observed actions taking place by prior persons who have used such property for hunting, dog training, or other activities involving the discharge of hunting guns and rifles using hunting guns…. Because of the time of day and weekdays when the noise of the activity takes place such activity has caused him to characterize such noise and as a nuisance…. Markland has demonstrated in these proceedings that such activity is unwelcome and is beyond an annoyance, but constitutes a nuisance, and interferes with his property rights for a reasonable use and enjoyment of his property….

Claimant's Response in Opposition to Respondent Dept. of Natural Resource's Second Motion to Dismiss and/or Motion for Summary Judgment and Respective Memorandums.

44. In the absence of standards under IC 14-22-2-6(b)(2) for shooting preserves, the administrative law judge determined predictability might be achieved and the intent of the legislative directive might be approached by implementing the concept offered by Markland. At a minimum, a shooting preserve should not constitute a nuisance.

45. "Nuisance" is defined at IC 32-30-6-6:

> Whatever is:
> (1) injurious to health;
> (2) indecent;
> (3) offensive to the senses; or
> (4) an obstruction to the free use of property;
> so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action.

An activity may be a nuisance, per se, such as a house of prostitution or an obstruction encroaching on a public highway. Whether something is a nuisance, per se, is a matter of law. An otherwise lawful use may become a nuisance, *per accidens*, "by virtue of the circumstances surrounding the use." Whether something is a nuisance, *per accidens*, is a

matter of fact. *Woodsmall v. Lost Creek Twp. Conservation Club*, 933 N.E.2d 899, 903 (Ind. App. 2010).

46. The activities anticipated by the subject licenses are not a nuisance, per se. They are lawful. The Indiana General Assembly has specifically authorized the licensure of shooting preserves within statutory parameters.

47. Swistek's operation of a shooting preserve under the subject licenses could be a nuisance, *per accidens*. Markland's welfare entitles him to be protected from operation of the subject licenses if it would otherwise impose a private nuisance. As stated in *Huffman* at 816, "This is precisely the type of fact that needs further development…."

48. With respect to Markland's assertion that operations under the subject licenses would cause him to be the victim of a nuisance, the administrative law judge determined a hearing of the facts should be conducted.

49. Markland testified at hearing about matters that could bear upon the existence of a nuisance. He expressed concern for safety hazards to himself and his family that can arise from the discharge of firearms. These are not unique to the operation of a shooting preserve, or the operation of the shooting preserve governed by the subject licenses, although greater frequency of discharges might pose greater risks. Markland testified to hearing loss that can result firearms discharges, a problem that is aggravated for him as a result of prior injury and hearing loss.[5]

50. Although Markland's grievances are matters of personal conviction, there is not a sufficient factual basis to support a conclusion the operation of the Crack of Dawn Hunt Club constituted a private nuisance under the subject licenses. The Indiana General Assembly authorized the DNR's licensure of shooting preserves. Swistek's exercise of

[5] Markland testified on direct examination to a decibel level which he experienced from a firearm discharge at the Crack of Dawn Hunt Club. His estimate was based on experience. On cross examination, he testified he had not measured the level with instruments. Even though no objection was raised to his testimony on direct, the testimony was unpersuasive. Instruments would more accurately and objectively measure sound intensity.

authority under the subject licenses appeared within reasonable expectations for a shooting preserve.

51. Perhaps more importantly, nuisance doctrine does not appear to be an effective standard for determining licensure under IC 14-22-31 and the operation of the Crack of Dawn Hunt Club or probably of shooting preserves, generally. An AOPA proceeding is not an ideal vehicle for determining what standards should apply. The subject seems likely to be more effectively reviewed and analyzed, with an opportunity for participation by the DNR and interested persons, through the Advisory Council[6] and the Commission. The timing is favorable. The original license expired last year and the renewal license expired at the end of April. Another license would not be required until the fall. Any direction by the Commission, whether in the form of rule or guidance (such as a nonrule policy document), would provide greater predictability for the Crack of Dawn Hunt Club and other shooting preserves, and well as their neighbors. Although a license for a shooting preserve is not conditioned upon zoning requirements, the Commission might conclude zoning is the most effective methodology for addressing the purposes of IC 14-22-2-6(b)(2).

Element Two: DNR Authority to Defend the Subject Licenses

52. Markland's second element urged:

> The DNR has no standing under law to defend its decision in issuing the permit since as a state agency it has no public interest in having the issuance of the permit sustained and the licensee [Crack of Dawn] has not defended or otherwise participated in this matter.

Markland contended in the Claimant's Response in Opposition to Respondent Dept. of Natural Resource's Motion to Dismiss and/or Motion for Summary Judgment and Respective Memorandums that the DNR lacked standing "to champion this cause for" Crack of Dawn "because there are issues of fact not dealt with by the DNR's review and Markland did not have the opportunity to contest these matters."

[6] See IC 14-9-6.

53. The DNR is the state agency primarily responsible for implementing the Fish and Wildlife Act. The DNR Director is responsible for regulating "wild animals regardless of whether the wild animals are present on public or private property in Indiana." IC 14-22-2-3(1).

54. Markland does not cite authority for the proposition the DNR cannot regulate wild animals on private property. IC 14-22-2-3(1) provides the agency is to "[p]rovide for the protection, reproduction, care, management, survival, and regulation of wild animal populations regardless of whether the wild animals are present on public or private property in Indiana."

55. Markland does not cite authority for the proposition the DNR lacks authority on administrative review to defend its licenses. The DNR typically defends its licensing decisions, including those issued under the Fish and Wildlife Act. *Cody, et al. v. DNR and Polarek,* 7 Caddnar 74 (1994). Indeed, IDEM's role in defending the license at issue in *Huffman* is parallel to DNR's role in defending the license here. Although concluding in *Huffman* IDEM construed standing too narrowly, the Indiana Supreme Court did not question IDEM's right to defend its license.

56. Markland's second element lacks legal foundation. In an interlocutory order, the administrative law judge dismissed the second element for failure to state a claim on which relief can be granted. The dismissal is affirmed.

Element Three: Existence of Public Purpose in Regulatory Structure

57. Markland's third element stated:

> Although subject to regulations and restrictions, the purpose and intent of the use of a shooting preserve license is fully and completely for private use, serving no public purpose or redeeming value to the general public to any degree which would concern the DNR. The DNR has no concern, interest, or purpose to see that the permit continues in effect, i.e., like an individual fishing license. [Crack of Dawn] is privately owned by individuals who are not employed and/or represent the DNR or the State of Indiana or acting in the interest of the agency.

58. Markland's third element was essentially a recasting of its second element and suffers from the same maladies. In an interlocutory order, the administrative law judge dismissed

the third element for failure to state a claim on which relief can be granted. A showing of public use or public purpose is not required for exercise of DNR jurisdiction under the Fish and Wildlife Code. The dismissal is affirmed.

II. NONFINAL ORDER

(1) Markland seemingly satisfies minimum AOPA requirements for standing to seek administrative review of the DNR issuance of the subject licenses.

(2) Except as otherwise provided in paragraph (3) and paragraph (4), the administrative law judge found in an interlocutory order that Markland failed to establish a claim on which relief could be granted under Trial Rule 12(B)(6). The finding is affirmed. All of Markland's claims are dismissed except as provided in paragraph (3) and paragraph (4).

(3) Except as provided in paragraph (4), the DNR established there is no genuine issue of material fact with respect to licensure under IC 14-22-31. Swistek satisfied the statutory requirements for location, ownership, subject species, and similar technical matters. An inspection by Conservation Officers for the DNR identified signage deficiencies, but these were corrected.

(4) The Fish and Wildlife Code (particularly IC 14-22-31) anticipates the DNR would address Markland's welfare as a person whose real estate is adjacent to the site where Crack of Dawn Hunt Club is licensed. If operation of the subject licenses caused a private nuisance to Markland's enjoyment of his real estate, they would not satisfy the requirements of IC 14-22-31-12(b) and IC 14-22-2-6(b)(2)(C). The evidence is insufficient to support a finding that operation of Crack of Dawn Hunt Club constituted a private nuisance.

(5) The DNR is entitled to defend any license issued under the Fish and Wildlife Code, including the subject licenses, in a proceeding. The administrative law judge denied Markland's motions to dismiss the DNR, or to strike pleadings or documents filed by the DNR, asserting the DNR did not have authority to defend. The denial is affirmed.